United States Court of Appeals

for the Second Circuit

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DIGNA BALLENILLA-GONZALEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

76-4130

B
P/s

ON PETITION FOR REVIEW OF AN ORDER OF DEPORTATION
FROM THE BOARD OF IMMIGRATION APPEALS

JOINT APPENDIX

MARY P. MAGUIRE
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FOR THE SOUTHERN DISTRICT
OF NEW YORK
UNITED STATES COURTHOUSE
Foley Square
New York, New York 10007
(212) 791-9165

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August 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DIGNA BALLENILLA-GONZALEZ, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	JOINT APPENDIX No. 76-4130

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No. A19 3[illegible] 676
Date: May 7, 1976

Mrs. Digna GALLEGILLA-Gonzalez
176 Plaza Avenue
Waterbury, Connecticut 06710

cc: Rafael L. Podolsky, Esquire
Waterbury Legal Aid & Reference Serv.
61 Field Street
Waterbury, Connecticut 06702

Dear Sir:

As you know, following a hearing in your case you were found deportable and the hearing officer has entered an order of deportation. A review of your file indicates there is no administrative relief which may be extended to you, and it is now incumbent upon this Service to enforce your departure from the United States.

Arrangements have been made for your departure to Dominican Republic (country) on Tuesday, May 18, 1976 (date) from Hartford, Connecticut (port of departure) ~~on the~~

on prearranged transportation
(name of vessel, airline, or other transportation);

You should report to a United States Immigration Officer at Room 417 (No.)
900 Asylum Avenue, 4th Floor
Hartford, Connecticut 06105 (address) at 1:00 p.m., Tuesday, May 18, 1976 (hour and date)

completely ready for deportation. At the time of your departure from Hartford, Connecticut (place of surrender) you will be limited to 44 pounds of baggage.

Should you have personal effects in excess of this amount you must immediately contact Mr. Hunt or Mr. DePalata at 244-2527 (name of officer) (phone no. and ext.), or call in person at the address noted above, and appropriate disposition of your excess baggage will be discussed with you.

TT/cm

Very truly yours,
James E. Smith
District Director

BEST COPY AVAILABLE

Form I-166
(Rev. 4-1-69)

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GPO 873-570

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A19 375 676 - Hartford

In re: DIGNA BALLENILLA-CARRION

DEC 4 - 1975

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christopher G. Bell, Law Student
Robert S. Catz, Esquire
Antioch School of Law
1624 Crescent Place, N. W.
Washington, D. C. 20009

Counsel of record:
Raphael L. Podolsky, Esquire
Waterbury Legal Aid and
Reference Service, Inc.
61 Field Street
Waterbury, Connecticut 06702

ON BEHALF OF I&N SERVICE: Paul C. Vincent
Chief Trial Attorney

ORAL ARGUMENT: September 24, 1975

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant student - remained longer

APPLICATION: Termination of proceedings; voluntary departure

A19 375 676

In a decision dated November 18, 1974, an immigration judge found the respondent deportable as charged, denied her application for voluntary departure, and ordered her deported from the United States. The respondent has appealed from that decision. The appeal will be sustained in part and dismissed in part.

The respondent, a native and citizen of The Dominican Republic, entered the United States as a nonimmigrant student in 1974. She remained beyond the period of her authorized stay, and deportation proceedings were instituted against her under section 241(a)(2) of the Immigration and Nationality Act.

On appeal counsel for the respondent contends that the respondent did not receive a fair hearing in that she was not represented by counsel. He asserts that she had just completed the tenth grade, did not understand the importance of the proceedings, and, as a consequence, did not effectively waive her right to counsel. He claims that, as an indigent, she was entitled to the appointment of counsel at government expense.

Section 242(b) of the Act provides that the alien shall have the privilege of being represented by counsel in deportation proceedings, but at no expense to the Government. It is not within the province of this Board to determine the constitutionality of the statutes it administers. Matter of L-, 4 I&N Dec. 556 (BIA 1959); Matter of Santana, 13 I&N Dec. 362 (BIA 1969). Moreover, the courts have held that there is no right to appointed counsel in deportation proceedings. Dunn-Marin v. INS, 426 F.2d 894 (9 Cir. 1970); Murgia-Melendez v. INS, 407 F.2d 207 (9 Cir. 1969). See also Henriques v. INS, 465 F.2d 119 (2 Cir. 1972), cert. denied 410 U.S. 968 (1973). Furthermore, counsel does not claim that the facts alleged in the Order to Show Cause and admitted by the respondent are not true. Nor do we perceive any prejudice to the respondent as a result of her failure to retain counsel, particularly in view of our disposition of the case. See United States v. Barthold, 517 F.2d 689 (5 Cir. 1975); Burquez v. INS, 513 F.2d 751 (10 Cir. 1975).

Upon the commencement of the hearing, the respondent, who was approximately 25 years old at the time, was informed of the nature of the proceedings against her and of her right to retain counsel. The entire hearing was conducted in the Spanish language and, when asked if she understood the translator, the respondent answered in the affirmative. After reviewing the entire transcript, we conclude that the respondent effectively waived her right to counsel.

At oral argument counsel stated that the respondent has sufficient funds with which to depart and, if given the opportunity to do so, would depart voluntarily. Having found the respondent statutorily eligible for the privilege of voluntary departure under section 244(e) of the Act, we shall grant the application in a favorable exercise of discretion. Accordingly, we shall sustain the respondent's appeal from the immigration judge's order denying voluntary departure.

We note that the immigration judge, in rendering his decision, should have included a discussion of the evidence pertinent to the application for voluntary departure. The summary order Form I-38 used by the immigration judge is proper only where there has been no application for discretionary relief, or where the only relief requested is voluntary departure and it is granted. 8 C.F.R. 242.17 and 242.18. See Matter of Wang, Interim Decision 2381 (BIA 1975).

ORDER: The appeal from the immigration judge's order denying voluntary departure is sustained. The appeal from the immigration judge's order finding the respondent deportable is dismissed.

FURTHER ORDER: The respondent is permitted to depart voluntarily from the United States at no expense to the Government within 30 days from the date of this order and under such conditions as may be fixed by the District Director; and upon her failure so to depart

when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the respondent shall be deported from the United States to The Dominican Republic on the charge contained in the Order to Show Cause.

Chairman

File No. A-19-[illegible]-SIU : UNITED STATES DEPARTMENT OF JUS

In the matter of : IMMIGRATION AND NATURALIZATION SERVICE

DIGNA VALLENILLA-CARRION a/k/a : AT HARTFORD

DIGNA BALLENILLA-CARRION : JULY 7, 1975

AFFIDAVIT OF DIGNA BALLENILLA-CARRION IN THE SPANISH LANGUAGE AND TRANSLATION INTO THE ENGLISH LANGUAGE

English Translation of Affidavit of Digna Ballenilla-Carrion (original Spanish affidavit follows and is attached)

My name is Digna Ballenilla-Carrion. I am twenty-five years old and a citizen of the Dominican Republic. I do not speak English and I understand very little english. I came to the United States in September, 1973, in order to go to school at Antillian College in Mayaguez, Puerto Rico.

The visa that allowed me to enter the United States was supposed to allow me to stay for up to a year, ending on September 13, 1974. My school year was over in May, 1974. At that time I wanted to go to Waterbury, Connecticut, where I have relatives. Before I left Mayaguez, I talked with Monica de Lescay, who worked in the office of the president of the college and was in charge of immigration affairs at the college. I told her that I wanted to go to Waterbury for the summer. She arranged to get papers for me so that I could go to the United States for the summer, and I thought that all the necessary arrangements were made and approved by the United States government. She told me that she would takecare of having all the forms sent in. I thought that everything was taken care of by the college. When I left Antillian College for Waterbury, I thought that I had the government's permission

to stay in the United States until the end of my visa period in September, 1974. I am not familiar with the procedures to be followed in filling out papers, and I thought that the college had taken care of everything.

During Christmas vacation I had gone back to the Dominican Republic for two weeks, and during that time I had become pregnant. The baby was due in mid-September. While I was in Waterbury, I needed prenatal care, which I received through the clinic at Waterbury Hospital. The social worker there, whose name is Jacqueline Flynn, told me that I would not be able to go back to the Dominican Republic on September 13, 1974, because I could not travel then due to my pregnancy. She told me that the hospital would send a letter to the Immigration Department and let it know and that I would not have to leave the country on September 13, 1974. She told me that the letter was in fact sent. I was under the impression that I had permission to remain beyond the end of my visa because of my inability to travel.

My baby was born in Waterbury on September 15, 1975. As soon as I could after that I went to Hartford to report to the immigration authorities. I am told that the day I went was October 8, 1974. I went there voluntarily -- nobody ordered me to go. My family in Waterbury had told me that my baby was an American citizen and that, as a result, I would now be able to stay in the United States. They said that I would be allowed to become a permanent resident. When I went to Hartford, I tried to tell the authorities that I had had a baby and that I wanted to stay in the United States as a permanent resident. I did not think that there would be any problem. I wanted to apply for permanent resident

status. The man there asked me some questions and then told me that I would have to come back again. He said that they would give me an appointment and that I would receive a letter telling me when to come. He also told me that the immigration authorities had never received the letter from Waterbury Hospital.

At the beginning of November, 1974, I got a letter from the immigration authorities telling me to come for my appointment on November 18, 1974. I still thought that this appointment was so that I could fill out my residency papers, so that I could become a permanent resident. I came back on November 18, 1974, as requested. Again I was asked a lot of questions. I had got a copy of the hospital's letter, which I showed to the man. The letter did not have a date on it, but my lawyer later found out from Mrs. Flynn that it was mailed on August 19, 1974. I have attached a sworn statement by Mrs. Flynn to my affidavit. The man who asked the questions asked me if I wanted to have a lawyer. I did not understand why I would need a lawyer, since I did not think that there was any problem with my staying.

Then, after he finished asking me questions, he told me that I had to leave the country. I tried to tell him that I did not understand why, since I had the baby and I thought that meant I could stay. Until he told me to leave, I had no idea that he had the power to order me to go -- I thought that I was going through all the preliminary questions to become a permanent resident.

I asked the man what I had to do if I wanted to stay, and he told me that I had to appeal to Washington, and I said I would do that. He also told me I should get help from Legal Aid.

During his questions, he asked me if I had any money to go back to the Dominican Republic. I did not understand why he was asking me that question, because I wanted to stay in the United States. I told him no, because I did not myself have the money to go. But, if I had to leave, I could have gotten the money from my family in Waterbury, because my cousin and her husband both work and would have helped me pay for a ticket back to the Dominican Republic. If I have to leave, I would rather leave voluntarily, and I do not want to be deported. But the man never asked me if I could get the money.

After the Immigration man told me I had to appeal, I went to Legal Aid in Waterbury and showed a lawyer there the paper that the man had given me. The lawyer told me that the paper was a deportation order. I did not understand what that was, and he had to explain it to me several times before I understood that I had been ordered deported. He also told me that my interview in Hartford on November 18 had been a deportation hearing and not just an interview. Until he explained these things to me, I did not understand that I had had a hearing. I had thought it was just an interview.

If I had known what my November 18 interview was actually about, I would have told the man that I wanted to have a lawyer. I could not have afforded to hire a lawyer then, but I could have gone to Legal Aid and had a lawyer from there represent me.

STATE OF CONNECTICUT)
)
COUNTY OF NEW HAVEN) ss: Waterbury July 7, 1975

I swear that I have read the foregoing affidavit and that the facts recited therein are true, to the best of my knowledge and belief.

/s/ Dirna Ballerilla-Carrion
DIRNA BALLERILLA-CARRION

Subscribed and sworn to before me this 7th day of July, 1975.

STATE OF CONNECTICUT)
) ss: Waterbury July 7, 1975
COUNTY OF NEW HAVEN)

The undersigned, being duly sworn, hereby deposes and says that the foregoing is an accurate translation into the English language of the affidavit in the Spanish language sworn to by Digna Ballenilla-Carrion.

Subscribed and sworn to before me this 7th day of July, 1975.

Commissioner of the Superior Court

Affiliated
with
THE YALE UNIVERSITY
SCHOOL OF MEDICINE
64 Robbins Street
Waterbury, Connecticut 06720

DEPARTMENT OF OBSTETRICS & GYNECOLOGY

U. S. Department of Justice
Division of Immigration & Naturalization
Post Office Building
Hartford, CT 06101

Re: Digna Ballenilla
Passport #02-62-47

Gentlemen:

Miss Ballenilla is currently under our care at the Waterbury Hospital Prenatal Clinic.

At seven (7) months gestation she is considered at high risk because of anemia and a positive tuberculin test. We therefore feel it would jeopardize her health care and that of her unborn baby to disrupt her current prenatal health care.

Sincerely,

Michael R. Berman

Michael R. Berman, M. D.
Department of OBS-GYN

MRB/clp

I certify that a copy of this letter was mailed on August 19, 1974.

Jacqueline M. Flynn

Jacqueline Flynn
Director of Social Service
Waterbury Hospital

Subscribed before and sworn to me this 17 day of MARCH.

Notary Public

My commission expires

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WILLIAM J. ADAMS

DECLARACION JTP

Mi nombre es [illegible] años de edad y soy ciudadana de la República Dominicana. [illegible] entiendo muy poco. Vine a los Estados Unidos en septiembre de [illegible] estudiar en el Antillian College de Mayaguez, Puerto Rico.

La visa que me permitió mi entrada a los Estados Unidos me daba suponer que me concedía un año de permanencia, [illegible] 13 de septiembre de 1.974. Mi año escolar terminó el [illegible] de 1.974. [illegible] yo deseaba ir a Waterbury, Connecticut, donde tengo familiares. Antes de salir de Mayaguez hablé con Mónica de Lescay, quien trabajaba en [illegible] del colegio y tenía a su cargo los asuntos de inmigración de [illegible] que deseaba ir a Waterbury para el verano. El [illegible] que yo pudiera ir a los Estados Unidos [illegible], y que todos los arreglos habían sido hechos y aprobados por el gobierno de los Estados Unidos. Ella me dijo que se encargaría del envío de todos los formularios. Yo pensé que el Colegio había arreglado todo. Cuando partí del Antillian College para Waterbury, yo pensé que contaba con el permiso para permanecer en los Estados Unidos hasta la terminación del periodo de mi visa en septiembre de 1.974. Yo no estoy familiarizada con los procedimientos del llenado de los papeles y pensé que el colegio se había encargado de todo.

En las vacaciones había vuelto a la República Dominicana por dos semanas y durante ese tiempo aparecí embarazada.

El niño debería nacer a mediados de septiembre. Mientras estuve en Waterbury necesité cuidado prenatal, el cual recibí en la clínica del Waterbury Hospital. La trabajadora social, cuyo nombre es Jaqueline Flynn, me dijo que no podía regresar a la República Dominicana el 13 de septiembre de 1.974, porque no estaba en capacidad de viajar para entonces, debido a mi embarazo. Me dijo ella que el Hospital enviaría una carta al Departamento de Inmigración para hacérselo saber y que

yo no tendría que abandonar el país en septiembre de 1.974. Ella me dijo que la carta había sido enviada en efecto. Yo estaba bajo la impresión de tener permiso para permanecer por más tiempo del indicado en mi visa, en razón de mi incapacidad para viajar.

Mi nono nació en Waterbury el 1º de septiembre de 1.975. Después de esto fui a Hartford tan pronto como pude para reportarme a las autoridades de inmigración. Se me ha dicho que el día de mi ida fué el 8 de octubre de 1.974. Yo fui allí por mi voluntad. Nadie me lo ordenó. Mi familia en Waterbury me ha dicho que mi nino es un ciudadano americano y que, por ello, yo podría permanecer en los Estados Unidos. Ellos me dicen que me sería concedida la residencia permanente. Cuando fui a Hartford traté de decirles a las autoridades que yo había tenido un niño y que deseaba quedarme en los Estados Unidos con residencia permanente. Yo no pensé que pudiera sobrevenir ningún problema. Yo deseaba solicitar la residencia permanente. El señor de allí me hizo algunas preguntas y luego me dijo que volviera otra vez. Me dijo que me daría una cita y que yo recibiría una carta en que me diría cuándo ir. Tambien me dijo que las autoridades de inmigración no habían recibido carta alguna del Waterbury Hospital.

A principios de noviembre de 1.974, recibí una carta de las autoridades de inmigración, diciéndome que [illegible] de 1.974. Yo todavía creía que [illegible] de mi residencia a fin de adquirirla en [illegible] de 1.974, como se me pedía. Nuevamente me [illegible]. Yo tenía una copia de la carta del Hospital, que le [illegible] al señor, [illegible] no tenía fecha, pero mi abogado posteriormente supo de [illegible]. Fijo que [illegible] puesta al correo en agosto 19 de 1.974. Yo había [illegible] para [illegible] a mi "affidavit". El hombre que me interrogaba [illegible] que [illegible] un abogado. Yo no entendí por qué habría de necesitar un abogado, [illegible] me podría haber ningún problema con mi estadía. Luego, después que [illegible] preguntas, me dijo que tenía que

salir del pa's. Trat— de decirle que yo no entendía el porqué, puesto que tenía el nino, lo cual implicaba que me podía quedar. Hasta cuando me dijo que tenía que irme yo no tenía ni idea de que el tuviera autoridad para ordenármelo. Yo pensaba que estaba pasando por todas las preguntas previas para obtener mi residencia permanente.

Le pregunté al señor qué tenía que hacer si quería quedarme y el me contestó que tenía que apelar a Washinton, y yo le dije que lo haría. El tambien me dijo que yo podía obtener ayuda del Legal Aid.

Durante las preguntas me dijo que si tenía dinero para regresar a la República Dominicana. Yo no entendí por qué hacía esa pregunta, ya que yo deseaba quedarme en los Estados Unidos. Yo le dije que no, pues no tenía el dinero para irme. Pero, si tenía que irme podía conseguir el dinero con mi familia en Waterbury, pues mi prima y su esposo ambos trabajan y me habrían ayudado a pagar el pasaje de regreso a la República Dominicana. Si tengo que irme prefiero hacerlo por mi voluntad, y no deportada. Pero el señor nunca me preguntó si podía conseguir el dinero.

Despu'es que el señor de la inmigración me dijo que yo tenía que apelar, fuí al Legal Aid de Waterbury y le mostré a un abogado el papel que el hombre me había dado. El abogado me dijo que era una orden de deportación. Yo no entendí qué era eso y el tuvo que darme varias explicaciones antes de que yo comprendiera que había sido ordenada mi deportación. También me explicó que mi entrevista de Hartford había sido una audiencia de deportación y no propiamente una entrevista. Si yo hubiera sabido lo que realmente fue mi entrevista de Hartford, yo le habría dicho al señor que deseaba la asistencia de un abogado.

Yo no habría podido pagar un abogado por supuesto, pero hubiera podido ir al

legal Aid y obtener que un abogado de allí me represente.

STATE OF CONNECTICUT)
) ss: Waterbury Julio 7 de 1975
COUNTY OF NEW HAVEN)

Yo juro que he leído la anterior declaración y que los hechos referidos en ella son verdaderos hasta donde alcanza mi conocimiento y mi creencia.

/s/ Virginia Ballenilla Carrion
VIRGINIA BALLENILLA CARRION

Subscribed and sworn to before me this 7th day of July, 1975.

Raphael L Podolsky
Commissioner of The Superior Court

File No. A-19 375 676-SIU : UNITED STATES DEPARTMENT OF JUSTICE

In the matter of : IMMIGRATION AND NATURALIZATION SERVICE

DIGNA VALLENILLA-CARRION a/k/a : BOARD OF IMMIGRATION APPEALS

DIGNA BALLENILLA-CARRION : JULY 7, 1975

MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DIGNA BALLENILLA-CARRION BEFORE THE BOARD OF IMMIGRATION APPEALS

Raphael I. Podolsky
Attorney at Law
Waterbury Legal Aid and Reference Service, Inc.
62 Field Street
Waterbury, Connecticut 06702
(203) 754-8074

File No. A-19 375 676-SIU : UNITED STATES DEPARTMENT OF JUSTICE

In the matter of : IMMIGRATION AND NATURALIZATION SERVICE

DIGNA VALLENILLA-CARRION a/k/a : BOARD OF IMMIGRATION APPEALS

DIGNA BALLENILLA-CARRION : JULY 7, 1975

MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DIGNA BALLENILLA-CARRION BEFORE THE BOARD OF IMMIGRATION APPEALS

SUMMARY OF THE ARGUMENT

The appellant was ordered deported for overstaying a student visa. At all times, the appellant, who speaks no English, believed that her visa had been duly extended by the Immigration and Naturalization Service and that her continued presence in the United States was legal. At no time until after she was ordered deported did she know that she was attending a deportation hearing, in that she thought she was applying for a permanent resident visa. During this "hearing," she waived her right to obtain counsel of her own choosing, without understanding either the nature and consequences of the right she was waiving or the nature of the hearing itself. The waiver was neither intelligent, knowing, or understanding; and it is a waiver she would not have made had she understood the nature of the proceedings. Nor did the Service otherwise provide her with counsel. In addition, she failed to understand the immigration judge's questions directed toward voluntary departure, and therefore failed to inform him of her access to funds with which to depart voluntarily.

17 As a result of the appellant's lack of counsel and failure to understand the nature of the proceedings against her, she failed t

create a record of the relevant facts, upon which her deportability could be judged or can be reviewed. She expressly denies that she was deportable when her hearing was held. Since the hearing below failed to meet the basic standards of fundamental fairness, the deportation order against her should be vacated and her case should be remanded to the immigration judge with instructions to hold a new hearing at which she can be represented by counsel.

REVIEW OF THE FACTS

The relevant facts are to be found in the record (including the transcript of the deportation hearing) and the appellant's affidavit. The appellant is a national of the Dominican Republic, who came to the United States in the fall of 1973 to attend school. She applied for and obtained a student visa student visa effective on September 13, 1973. It was her understanding that the visa would authorize her staying in the United States for up to one year, until September 13, 1974. She duly entered the country and attended school at Antillian College in Mayaguez, Puerto Rico, from September, 1973, until May, 1974. She traveled back to the Dominican Republic for Christmas vacation in December, 1973, and returned to Antillian College on January 8, 1974. It appears that during this vacation period she became pregnant.

At the end of the school year, the appellant wanted to come to Waterbury, Connecticut, where she had relatives, for the summer. She talked to the appropriate official at Antillian College, who was named Monica de Lescay. Mrs. Lescay's job at the college included handling the

immigration problems of its students. The appellant requested an extension of her visa until September 13, 1974, and believed that Mrs. Lescay had arranged to obtain and submit the necessary papers to INS for her. The Service, however, has no record of having received any such papers. The appellant, believing everything was in order and properly authorized, then went to Waterbury, where she stayed with her relatives.

Her pregnancy required pre-natal care, which she obtained from Waterbury Hospital. The hospital was aware that she had to leave the country by September 13, 1974, but her supervising physician, Dr. Michael R. Berman, felt that travel at that time would be medically dangerous. As a result, he authorized the mailing of a letter to INS which stated:

> At seven (7) months gestation she [the appellant] is considered a high risk because of anemia and a positive tuberculin test. We therefore feel it would jeopardize her health care and that of her unborn baby to disrupt her current prenatal care.

The letter was processed through the office of the Director of Social Services, whose records show that it was mailed to the INS office in Hartford on August 19, 1974. INS states that it did not receive a copy of this letter until the appellant produced it at her November 18 hearing.

The baby was born on September 15, 1974, and about two weeks later the appellant voluntarily reported in person to the INS office in Hartford. It is clear that she was not in any way trying to hide her presence in the United States. She thought that she had been authorized to remain in the United States until September 13, 1974, and that this date had been further extended for health reasons. This assumption, combined with her inability to speak or understand English, led to a series

of misunderstandings between her and INS, which were not clarified for her until she sought legal assistance immediately after the issuance of the deportation order against her.

The appellant had been informed by family and friends that the birth of her baby, who was an American citizen, would permit the conversion of her student visa into a permanent resident visa. This advice, of course, was ill-founded, but the appellant did not know this. When she went to INS on October 8, 1974, it was to confirm the birth of the baby and to fill out the necessary permanent resident application forms, a process she thought would be relatively routine. She was questioned by an investigator, with no understanding whatsoever that the purpose of the questions was to establish probable cause for her deportation. To her it was all part of the residency application process.

She was told that she would be given an "appointment" to come back, received a notice, and returned on November 18, 1974, in accordance with the notice. She still thought that she was applying for permanent resident status. In fact, the "appointment" was a deportation hearing. The immigration judge concluded that she was waiving counsel, examined her, found that she was deportable and not eligible for voluntary departure, and ordered her deported. The appellant did not understand until the end of the hearing that she was being deported and indicated immediately her desire to appeal. Shortly after the deportation order was issued, she sought legal assistance, and this appeal followed.

I. THE APPELLANT WAS DEPRIVED OF HER RIGHT TO A FAIR HEARING, IN THAT SHE DID NOT UNDERSTAND THE NATURE OF THE PROCEEDING AGAINST HER AND DID NOT INTELLIGENTLY, KNOWINGLY, OR UNDERSTANDINGLY WAIVE HER RIGHT TO BE REPRESENTED BY COUNSEL AT HER OWN EXPENSE.

A. THE APPELLANT DID NOT UNDERSTAND THE NATURE OF THE PROCEEDINGS AGAINST HER.

It is fundamental that an alien may not be deported without first receiving a fair hearing on his or her deportability. This requires that the procedural rights of the alien be protected. In Bridges v. Wixon 326 US 135, 154, 65 SCt 1443, 89 LEd 2103 (1945), the Supreme Court said:

> Here the liberty of an individual is at stake....We are dealing here with procedural requirements prescribed for the protection of an alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness. [emphasis add

If the appellant's hearing below was not fair, then this case must be returned to the immigration judge for a new hearing.

A hearing cannot be fair unless the alien understands the nature of the proceeding, i.e., that he is attending a deportation hearing and that a possible consequence of the hearing my be an order to deport h Handlovits v. Adcock, 80 F.Supp. 425 (E.D.Mich., 1948).

The Appellant in this case attended a deportation hearing under a misconception that she was being reviewed for the adjustment of h visa status to permanent residence and with no appreciation that the Serv had charged her with being subject to deportation. This confusion underl the entire record and is evident throughout it. It is most explicit in t appellant's affidavit:

> My family ... said that I would be allowed to become a permanent resident. When I went to Hartford, I tried to tell the authorities that I had had a baby and that I wanted to stay in the United States as a permanent resident. I did not think that there would be any problem. I wanted to apply for permanent resident status. [Translation of appellant's affidavit, pp. 2-3]

> At the beginning of November, 1974, I got a letter from the immigration authorities telling me to come for my appointment on November 18, 1974. I still thought that this appointment was so that I could fill out my residency papers, so that I could become a permanent resident. * * * Until he [the immigration judge] told me to leave, I had no idea that he had the power to order me to go -- I thought that I was going through all the preliminary questions to become a permanent resident. [ibid., p. 3]

> The lawyer [at Legal Aid] told me that the paper was a deportation order. I did not understand what that was, and he had to explain it to me several times before I understood that I had been ordered deported. He also told me that my interview in Hartford on November 18 had been a deportation hearing and not just an interview. Until he explained these things to me, I did not understand that I had had a hearing. I had thought it was just an interview. [ibid., p. 4]

The appellant's affidavit is confirmed by her innocent behavior in voluntarily appearing at INS less than three weeks after her baby's birth. See ibid., p. 2. It is also confirmed by the transcript itself.[1] Because the appellant thought that she was being routinely processed for permanent resident status, she could not understand the purpose of the judge's questions about a lawyer or about her leaving voluntarily, nor could she appreciate that some "problem" existed about her status in the country. Her colloquy with the immigration judge at pp. 1-2 of the transcript illustrates her confusion:

[1] It should be noted that the transcript of the hearing is in English, although all the appellant's testimony was in Spanish, as was the interpretation by Margarita Miller of the immigration judge's questions. At the present date, which is more than seven months after the hearing, it is impossible for the appellant to confirm the accuracy or completeness of the transcript, or whether subtle connotations were altered by translation. It should also be noted that a portion of the testimony (Transcript, p. 3, l. 11-12 appears to have been omitted from the transcript. 12-13

Q ... Do you wish to have a lawyer or representative here, or do you wish to speak without a lawyer or representative?

A Will there be a problem? I don't know.

Q Well, as I told you, I'm going to decide whether you should be deported, and you have an opportunity to show why you should not be deported or why you should be allowed to leave voluntarily or not deported, and at the end of the hearing I will decide what is to be done. It may be that you be deported, it may be that you get some relief from deportation and be found not deportable. Now, it's up to you as to whether you wish to have a representative here at the hearing. What do you wish to do?

A Would it be better to have a lawyer?

Q Well I don't know what your case is. Now if you wish to have time to think it over we'll recess the hearing while you determine what you want to do.

A I don't think there will be any problem. I don't think I need a lawyer.

The transcript also reveals that the Order to Show Cause had not been either read or explained to the appellant in Spanish prior to the hearing. [Transcript, p. 3, l. 8-11]

The remainder of the appellant's conduct at the hearing also supports her affidavit. She thought that the reason for her second "interview" was that INS did not have all the evidence about the birth of her baby. She therefore promptly produced the letter from Waterbury Hospital confirming her pregnancy [Transcript, p. 2, l. 16-21], a document which the immigration judge initially ignored; and she produced her baby's birth certificate as soon as the judge would receive it. [Ibid., p. 5, l. 15-18] Throughout the hearing, she kept trying to discuss the baby, which was the subject that she thought she was there to talk about, and it is evident from the transcript that she was perplexed by the immigration judge's disinterest in her pregnancy, the baby's birth certificate, and the facts about the child generally. At

times she seems to have been so confused that she answered in a totally unresponsive manner /Ibid., p. 5, l. 17-19/:

> Q ... I will have to enter an order that you be deported. Do you understand?
>
> A I was seven months pregnant at the time, but the baby was born.

The appellant does not claim that the immigration judge attempted to obscure the nature of the hearing. The transcript indicates some efforts on his part to clarify its purpose. The appellant maintains, however, that in fact she did not understand the nature of the hearing. This situation is documented not only by her own affidavit but, circumstantially, by the transcript itself. Under such circumstances, the appellant did not have a proper opportunity to attempt to meet the charges against her, since she did understand that there were any charges against her, and the hearing must necessarily be voided and held again de novo.

B. THE APPELLANT DID NOT INTELLIGENTLY, KNOWINGLY, OR UNDERSTANDINGLY WAIVE COUNSEL.

Because the appellant did not know the purpose of her presence before the immigration judge, her ambiguous waiver of counsel does not rise to the level of intelligent, knowing, or understanding and did not constitute a valid waiver of counsel under the Immigration Act. There is no question that the appellant had a statutory right to be represented by counsel at her own expense. The Immigration Act, 8 USC 1362, expressly states:

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

Similar language is found at 8 USC 1252(b)(2) and related regulations at 8 CFR 242.10 and 8 CFR 242.16(a).

The appellant may waive her right to counsel; but for such a waiver to be valid, it must be intelligent, knowing, and understanding. This has long been the standard in criminal cases. See Johnson v. Zerbst, 304 US 458, 464, 58 SCt 1019, 82 LEd 1461 (1938) (Waiver is "an intentional relinquishment or abandonment of a known right or privilege.") and U.S. v. Brady, 397 US 742, 748, 90 SCt 1463, 25 LEd2d 747 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). The same standard has been applied to civil proceedings by the Supreme Court, Overmyer Co. v. Frick Co., 405 US 174, 92 SCt 775, 31 LEd2d 124 (1972), and to immigration proceedings by the Circuit Courts. See, for example, Valasquez Espinosa v. INS, 404 F2d 544, 546 (9 Cir., 1968), where the court stated the standard as "a knowing, intelligent and voluntary waiver of counsel," and Yiu Fong Cheng v. INS, 418 F2d 460 (DC Cir., 1969), in which both the majority and the dissenting opinions applied the same test for determining whether a waiver was valid.

Both the affidavit and the transcript show that the appellant did not intend at all to waive her right to be represented by counsel at a deportation hearing, let alone enter an intelligent, knowing, or understanding waiver of that right. Any waiver that may have been made was a waiver of counsel at an interview on establishing permanent resident status and not a waiver of counsel at a deportation hearing. In her affidavit the appellant states:

> The man who asked the questions asked me if I wanted to have a lawyer. I did not understand why I would need a lawyer, since I did not think that there was any

> problem with my staying. * * * If I had known what my November 18 interview was actually about, I would have told the man that I wanted to have a lawyer. [Translation of appellant's affidavit, pp. 5-6]

The same facts are implicit in her testimony. For example, in response to questions about whether she wanted an attorney, she did not say "no" but instead persisted in asking whether there would be a "problem" [Transcript, p. 1, l. 22, and p. 2, l. 9], indicating that nothing was occurring which would create any problem about her status. She also asked the judge, "Would it be better to have a lawyer?" [Ibid., p. 2, l. 5], and a waiver of sorts was elicited only after her comment:

> I don't think there will be a problem. I don't think I need a lawyer. [Ibid., p. 2, l. 9-10]

Read in light of the appellant's belief that she was merely producing information to qualify for permanent residence and not defending a deportation charge, this statement should not be viewed as a waiver of counsel at a deportation hearing.

In addition, the immigration judge's own answers to the appellant's questions about counsel were misleading and themselves contributed to the misinformation upon which the "waiver" was predicated. Although the judge honestly said, "Well I don't know what your case is" [Ibid., p. 2, l. 6] and presumably did not know the facts of the particular case, he must have known that he was conducting a deportation hearing; that the appellant did not speak English; that the INS believed that it had a prima facie case of deportability against the appellant; and that, as a general rule, a lawyer would be helpful in the preparation of a defense. He also must have known from the appellant's statements to him that she was struggling to understand

the purpose of counsel and was not rejecting counsel out of hand. He was thus very much on notice that the appellant probably wanted counsel. In the context reflected in the hearing transcript, his evasive answers were themselves a factor in misleading the appellant to proceed without counsel. See Transcript, p. 1, l. 17 through p. 2, l. 10.

The unknowing nature of the waiver decision was compounded by the lack of time for reflection and consultation imposed upon the appellant. The Act anticipates that the alien will have reasonable notice of the deportation proceedings and a reasonable opportunity to examine the evidence against him and to prepare his defense. 8 USC 1252(b)(1) and 8 USC 1252(b)(3). The regulations guarantee at least seven days advance notice of the hearing, 8 CFR 242.1(b), and that requirement is mandatory, Yiu Fong Cheung v. INS, 418 F2d 459 (D.C.Cir., 1969). In the present case, however, the appellant had no such opportunity, because she did not know that she was being summoned to a hearing. [Translation of Appellant's Affidavit, p. 3]. The most that was offered her was the opportunity for a "recess" [Transcript, p. 2, l. 6-8], but there is no suggestion whatsoever that the immigration judge was suggesting that she could have a day or two to go home and think the matter over, with the advice of family and friends.

All these elements, taken together, mandate the holding of a new hearing. In reviewing these facts, the appellant urges the Board of Immigration Appeals to inspect the case of Mandlovits v. Adcock, 80 F. Supp. 425 (E.D.Mich., 1948), the facts of which bear a close similarity to those here. Although that case is a quarter of a century old, the court's analysis is helpful in resolving the legal issues here. In Mandlovits the alien

rejected the opportunity to obtain a lawyer, but subsequent events revealed that she had not understood what she was doing. The court wrote:

> The balance of the letter [written six days after waiver] clearly indicates the petitioner's complete lack of understanding of the nature of the proceedings which had been instituted against her by the Immigration and Naturalization Service, 80 F.Supp. 425, 427.

It concluded, at 80 F.Supp. 425, 427-28:

> It is plain from a reading of the pertinent provisions [of the regulations] that it is the intent of the Department to give an alien a full opportunity to obtain counsel if desired, and to arrange for a defense. * * * It was the duty of the examining officer to explain such an important right to a person, not in a perfunctory way but in a manner which would assure such an examining officer that the alien fully understood her rights ...

See also Yiu Fong Cheung v. INS, 418 F2d 460, 463 (D.C.Cir., 1969), in which the court hold that an alien is entitled to a reasonable "opportunity for information and reflection concerning the pro's and con's of proceeding without counsel."

In the present case, the alien did not understand that her liberty was in jeopardy, did not understand the nature of the proceedings, and did not understandingly waive her right to a lawyer. In addition, she had no time in which to consider how to proceed. As a result, she did not receive the fair hearing to which she was entitled by law.

II. THE DEFECTS IN THE APPELLANT'S HEARING REQUIRE REVERSAL OF THE DEPORTATION ORDER.

A. IF AN ALIEN IS DEPRIVED OF HIS STATUTORY RIGHT TO OBTAIN COUNSEL, HIS DEPORTATION HEARING IN FACT BE INVALID AND A NEW HEARING MUST BE HELD.

The right to obtain counsel is not contingent upon whether counsel would be useful, helpful, or effective, or would otherwise change

the result of the hearing. The statute, 8 USC 1362, affords an unqualified right to obtain counsel. Unless there is a valid waiver, a hearing without counsel is void. See, for example, Barrese v. Ryan, 189 F. Supp. 449 (D.C.Conn., 1960); Handlovits v. Adcock, 80 F. Supp. 425 (E.D.Mich., 1948); Yiu Fong Cheung v. INS, 418 F2d 460 (D.C.Cir., 1969). In Yiu Fong Cheung the District of Columbia Circuit said, at 418 F2d 460, 464:

> While there is limited room in administrative law for the doctrine of harmless error, this must be used gingerly, if at all, when basic procedural rights are at stake.

The right involved here is not merely one created by judicial construction but one mandated by the immigration statutes themselves.

B. THE APPELLANT WAS, IN ANY EVENT, SEVERELY PREJUDICED BY THE INADEQUACIES OF THE HEARING.

1. THE APPELLANT WAS DEPRIVED OF HER RIGHT AND HER ABILITY TO PRESENT HER FULL DEFENSE TO THE IMMIGRATION JUDGE.

This is not a case in which deportability was conceded. The appellant did not deliberately overstay her visa. Her affidavit describes her understanding of her status in this country. She believed that she had twice received visa extension. If this were true and she could establish those facts, she would not have been in violation of the immigration laws when she reported to INS on October 8, 1974. Although the immigration judge attempted to force from her an admission of deportability, the transcript reveals that the appellant was attempting, with limited intellectual resources and knowledge of the law and in the face of a language barrier, to contest deportability. For example, when the judge told her that she was charged with remaining beyond her time as a student, she responded:

> I was going to ask the school for more time here and that they have to accept a letter and then they told me that it was alright. /Transcript, p. 3, l. 20-21/

The judge ignored her response, saying, "We will come to a discussion about that in due course" /Ibid., p. 3, l. 22-23/ and instead sought to force an admission of deportability. In fact, however, the judge never returned to the question of whether an extension of visa beyond the school year had been sought, and he considered the hospital's letter requesting a further extension only after he had found the appellant deportable.

Deportability itself was thus in issue in this hearing. A reading of the transcript as a whole indicates the inability of the appellant to present her case without some assistance, a situation aggravated by her inability to speak English. It is also a situation of which the immigration judge should have been aware from her testimony.

The appellant has submitted an affidavit in support of this appeal. She does not claim that her affidavit necessarily proves a defense to the charge against her. She does maintain, however, that it suggests the possibility of a defense, indicates the incompleteness of the hearing record, and casts doubt on the fairness of the hearing and her ability to present her defense. It thereby constitutes a sufficient showing of prejudice to require a remand for a new hearing.

2. THE APPELLANT WAS DEPRIVED OF HER OPPORTUNITY TO AVOID DEPORTATION BY AGREEING TO LEAVE THE COUNTRY VOLUNTARILY.

The immigration laws, 8 USC 1254(e), make special provision that the Attorney General, in his discretion, may permit an alien to depart voluntarily, in lieu of deportation, provided that the other conditions of the law are satisfied. These conditions include the requirement that the alien establish "that he is willing and has the immediate means with which to depart promptly from the United States," 8 CFR 244.1.

From the immigration judge's questions [Transcript, p. 4, l. 25, to p. 5, l. 11], it appears that he was willing to exercise his discretion to allow voluntary departure, but concluded that one of the prerequisites -- the financial means to depart -- was absent. That conclusion is simply incorrect, and there is no question that an attorney would have clarified the misunderstanding upon which the judge's conclusion was based. The transcript reads as follows:

> Q Now, do you wish to apply to leave voluntarily from the United States without expense to the government instead of being deported? We will consider the matter of how much time you would have to do this in due course but, if you have the money or other means by which you can depart without cost to the government and you are willing to depart when you're told you must depart, you may apply to leave voluntarily without being deported. Do you wish to apply for the privilege?
>
> A I don't have money.
>
> Q Alright then if you don't have the money and there are no funds available to you from any source or other means to depart without cost to the government, I must enter an order that you be deported. [Tr. 7]

Thus, the appellant answered the immigration judge's inquiry as to whether she had money by answering literally, saying, "I don't have money." That statement was true, since she was not supporting herself in the United States and had no funds of her own. But she had access to funds with which to depart, since her relatives who were supporting her had money. The statement that "there are no funds available to you from any source or other means to depart without cost to the government" was made by the immigration judge and not by the appellant; and he gave her no opportunity to respond. Her affidavit makes the true situation clearer:

> During his questions, he asked me if I had any money to go back to the Dominican Republic. I did not under-

> stand why he was asking me that question, because I wanted to stay in the United States. I told him no, because I did not myself have the money to leave. But, if I had to leave, I could have gotten the money from my family in Waterbury, because my cousin and her husband both work and would have helped me pay for a ticket back to the Dominican Republic. If I have to leave, I would rather leave voluntarily, and I do not want to be deported. But the man never asked me if I could get the money. [Translation of Appellant's Affidavit, p. 4]

The granting of voluntary departure is a matter for the exercise of discretion by the immigration judge, but it is not beyond the power of review, even by the courts. That rule is express in the Second Circuit, U. S. ex rel. Exarchou v. Kurff, 265 F2d 504, 506 (2 Cir., 1959) ("But in all respects the denial of a petition for voluntary departure must not be arbitrary or capricious"). See also Likas v. Hoy, 371 F2d 415 (7 Cir., 1966); Ullah v. Hoy, 278 F2d 194, 196 (9 Cir., 1960); and Hegerich v. DelGuercio, 255 F2d 701 (9 Cir., 1958). In Hegerich the Ninth Circuit agreed that the alien was deportable but nevertheless found an abuse of discretion in denying voluntary departure because the alien's overstay of his visa was innocent and minimal:

> His overstaying was de minimis in time. Blunderingly, he was trying to comply with the law. It is clear that his conduct was neither slick nor foxy. In this field of voluntary departure, ordinarily action unfavorable to the deportee must be upheld. But the government, as it should, seems to concede that there can be a case where the denial of voluntary departure can be an abuse of administrative discretion. This court holds that this is it, 255 F2d 701-02.

Voluntary departure is an alternative to deportation and thus affects the deportation decision. The failure to grant voluntary departure may have severe consequences for the appellant's ability to reenter the United States, which is of especial importance here, since she is the mother of an American citizen. The prejudice from lack of counsel is thus substantial.

3. THE ABSENCE OF COUNSEL DEPRIVED THE APPELLANT OF ADVICE AS TO HER ALTERNATIVES AND OF EFFECTIVE ASSISTANCE IN THE GOVERNMENT'S ATTEMPT TO DEPORT HER.

The full prejudicial effect of a lack of counsel is often subtle and hard to specify. See Rose v. Woodvine, 344 F2d 993, 995 (4 Cir., 1965) (counsel might have advised as to sorts of evidence that could be presented at alien's hearing); Handlovits v. Adcock, 80 F. Supp. 425, 428 (E.D.Mich., 1948) (counsel might have obtained time for alien to get pardon for minor crime, which was the basis of her deportation); Yiu Fong Cheung v. INS, 418 F2d 460, 464 (D.C.Cir., 1969) (counsel might have influenced time for voluntary departure, efforts to obtain a preference, and interim bail).

Counsel here might have been able to explore various alternatives to deportation with the Service. In this case, however, there is no need for the appellant to rely upon such intangible prejudice, because the specific and identifiable prejudice to her claim is enormous.

III. THE IMMIGRATION JUDGE SHOULD HAVE APPOINTED COUNSEL FOR THE APPELLANT, IF HE DETERMINED THAT SHE COULD NOT AFFORD COUNSEL.

There is no statutory requirement that counsel be appointed for an alien in a deportation proceeding, but merely a requirement that she be allowed to obtain her own counsel. Nor has any court yet ruled that the appointment of such counsel is constitutionally necessary. The most recent case in this Circuit is Hendriques v. INS, 465 F2d 119 (2 Cir., 1972), cert. denied, 410 US 968, 93 SCt 1452, 35 LEd2d 703 (1973), in which the court refused to reach the issue in a case where it found it clear that the alien was deportable anyway. It nevertheless said, at 465 F2d 119, 121:

> Nothing we say here is intended to express any opinion on the question whether, in a deportation hearing where the furnishing of counsel might have an effect upon the outcome of the deportation hearing itself, indigent aliens are entitled to have counsel furnished at government expense. That is another question, what this court has called a 'grave' one, for another day. Castoneda v. INS, 456 F2d 240 (2d Cir. 1972); see Haney, Deportation and the Right to Counsel, 11 Harv. Int'l L.J. 177 (1970).

The issue is, indeed, grave, since the right to appointed counsel has long been recognized as fundamental, Powell v. Alabama, 287 US 45, 53 SCt 55, 77 LEd 158 (1932); Gideon v. Wainwright, 372 US 335, 83 SCt 792, 9 LEd2d 799 (1963). That right was once limited to criminal proceedings, but it has now been extended to such non-criminal hearings as those in the juvenile courts, In re Gault, 387 US 1, 87 SCt 1428, 18 LEd2d 527 (1967).

The appellant recognizes that the Service is unlikely to confront the question of appointed counsel in deportation proceedings unless ordered to do so by the courts. Nevertheless, she feels it is her duty in this case to call the matter to the Board's attention. The duty to inquire as to the facts concerning indigency rests initially on the immigration judge, Rosales-Caballero v. INS, 472 F2d 1158, 1160 (5 Cir., 1973). The appellant here was able, with the assistance of her family to afford the cost of an airplane ticket to the Dominican Republic for voluntary departure, a cost of less than $200. On the other hand, private counsel in a contested and fully litigated deportation hearing and appeal would have been far more expensive, and she could not afford to hire such an attorney. She was, however, eligible for free legal assistance provided by the Waterbury Legal Aid and Reference Service, Inc., which she eventually obtained for this appeal. See Translation of Appellant's Affidavit, p. 4. There was thus enough information before the immigration judge to have warranted his

exploration of the need for appointed counsel and for his making a determination of the matter. Because of the appellant's limited financial resources and because the issue of deportability was here being contested, this case appears on its face to be within the category for which the Hendriques court reserved judgment.

CONCLUSION

The appellant in this appeal requests that the Board of Immigration Appeals vacate the deportation order entered by the immigration judge and order that a new hearing be held at which she may be represented by counsel and at which she may have the opportunity to attempt to prove a defense to the charges against her, or otherwise to avoid deportation.

Respectfully

By _____
Raphael L. Podolsky
Staff Attorney
Waterbury Legal Aid and Reference Service
[illegible] Field Street
Waterbury, Connecticut 06702
(203) [illegible]

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

Fee Stamp

In the Matter of:
DIGNA VALLENILLA-CARRION aka
DIGNA BALLENILLA-CARRION

File No. A19-375-376

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated November 18, 1974, in the above entitled case.

2. Briefly, state reasons for this appeal.

(1) I believe that I was in the United States legally, because I thought that my school had applied for an extention of my visa in May, 1974, after I gave them all the necessary papers, and Waterbury Hospital told me that they had contacted immigration to get me more time because I could not travel because I was having a baby in September, 1974.

(2) When I went to the immigration office on October 8, 1974, I thought that I was applying for a permanent resident visa and I did not understand that I was in danger of being deported, because I did not think that I had done anything wrong. I did not understand until the end of the hearing on November 18, 1974, that the government wanted to deport me.

(3) I did not understand that I was in danger of being deported, and for that reason I did not ask for a lawyer. If I had understood I would have wanted a lawyer. I did not knowingly waive my right to a lawyer.

3. I do (do) (do not) desire oral argument before the Board of Immigration Appeals.

Washington, D.C.

(See attached sheet)

4. I am (am) (am not) filing a separate written brief or statement.

Digna Ballenilla Carrion
Signature of Appellant (or attorney or representative)

DIGNA BALLENILLA CARRION
(Print or type name)

172 Plaza Ave.
Waterbury, Conn. 06710
Address (Number, Street, City, State, Zip Code)

November 25, 1974
Date

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev. 8-15-71)N

ATTACHMENT TO QUESTION #2

(4) I believe that the government should have appointed a lawyer for me, since it knew that I was in danger of being deported and I did not understand this.

(5) If I had to leave, I believe I should have been allowed to depart voluntarily.

Jaime Ballenilla Carrión

19356 16

STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

Olga Ballenilla-Carrion

Respondent.

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

DECISION OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made no application for relief from deportation.

ORDER: It is ordered that respondent be deported from the United States to Dominican Republic on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, respondent shall be deported to _____.

Copy of this decision has been served upon respondent.

Appeal: ~~Waived~~ reserved

Time for appeal expires Nov. 29, 1974

Date Nov. 18, 1974

Place: Hartford, Conn.

E. R. Grant

(Immigration Judge)

Form I-38
(Rev. 5-1-73) N

38

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

MATTER OF

DIGNA BALLENILLA-CARRION

FILE A- 19 375 676

IN DEPORTATION PROCEEDINGS

TRANSCRIPT OF HEARING

Before: EUGENE C. CASSIDY, Immigration Judge

Date: November 18, 1974 Place: Hartford, Connecticut

Transcribed by Rosemary E. Lostimolo Recorded by Gray Audograph

Official Interpreter Margarita Miller

Language Spanish

APPEARANCES:

For the Service:

No One
Trial Attorney

Station

For the Respondent:

No One

Form I-297
(Rev. 6-1-73)N

GPO 861-991

HEARING HELD NOVEMBER 18, 1974

IMMIGRATION JUDGE TO RESPONDENT THROUGH INTERPRETER:

Q What is your name?

A Digna Ballenilla-Carrion

Q Do you understand this lady when she speaks to you in the Spanish language?

A Yes. Sure.

IMMIGRATION JUDGE:

Let the record show Margarita Miller, the official interpreter of the Immigration and Naturalization Service in the Spanish language, is present. Her services will be used throughout the conduct of this proceeding.

IMMIGRATION JUDGE TO RESPONDENT:

Q This hearing is to determine whether you shall be deported from the United States. At this hearing you will have an opportunity to show why you should not be deported. Do you understand?

A Yes.

Q You have a right to be represented here, if you wish, by an attorney or representative of your own choice and without expense to the United States government. Do you wish to have a lawyer or representative here, or do you wish to speak without a lawyer or representative?

A Will there be a problem? I don't know.

Q Well, as I told you, I'm going to decide whether you should be deported and you have an opportunity to show why you should not be deported or why you should be allowed to leave voluntarily or not deported, and at the end of the hearing I will decide what is

to be done. It may be that you be deported, it may be that you get some relief from deportation and be found to be not deportable. Now, it's up to you as to whether you wish to have a representative here at the hearing. What do you wish to do?

A Would it be better to have a lawyer?

Q Well I don't know what your case is. Now if you wish to have time to think it over we'll recess the hearing while you determine what you want to do.

A I don't think there will be any problem. I don't think I need a lawyer.

Q Alright, I will show you whatever I'm going to consider in your case. If there is anything shown to you which you think should not be considered you have a right to say so and to object to it and you will also have an opportunity to offer anything you wish to have considered in your own case. Do you understand?

A Yes, but I have a letter here from the hospital.

IMMIGRATION JUDGE:

Let the record show the Respondent submits a photostatic copy of a letter directed to the Immigration Service, Waterbury Hospital, it does not have a date on it. It says that she is currently attending the prenatal clinic there.

IMMIGRATION JUDGE TO RESPONDENT:

Q Will you please stand up and raise your right hand. Do you solemly swear that the testimony you give us is the truth, the whole truth, and nothing but the truth, so help you God?

A Yes.

Q Have a seat. Did you receive a copy of this Order to Show Cause and Notice of Hearing issued in the case of Digna Ballenilla-Carrion on November 4?

IMMIGRATION JUDGE:

Let the record show that this is an exhibit, a copy of the Order to Show Cause. The Order to Show Cause is marked Exhibit No. 1.

IMMIGRATION JUDGE TO RESPONDENT:

Q Has this been read and explained for you in the Spanish language so that you know what it says?

A They didn't read it to me. They only told me that this is the important . . .

OFF THE RECORD

ON THE RECORD

IMMIGRATION JUDGE TO RESPONDENT:

Q Do you understand this now?

A Yes.

Q Do you understand this charge that you are deportable because you were admitted to the United States as a student for a limited time and you have remained without authority for longer than that time?

A I was going to ask the school for more time here and that they have to accept a letter and then they told me that it was alright.

Q Do you understand the charge? We will come to a discussion about that in due course. Do you understand what the charge is in this paper?

A Yes.

Q The Order to Show Cause states first you are not a citizen or

national of the United States and second you are a native of the Dominican Republic and a citizen of the Dominican Republic. Are those statements true?

A Yes.

Q Third, you entered the United States at San Juan, Puerto Rico on or about January 8, 1974 and fourth, at that time you were admitted as a student and were authorized to remain in the United States in that status until May 30, 1974. Are those statements true?

A Yes.

Q And fifth, you have remained in the United States beyond May 30, 1974 without authority of the United States Immigration and Naturalization Service. Is that true?

A Yes.

Q It is charged that because of these facts you are subject to being deported under the provisions of Section 241(a)(2) of the Immigration and Nationality Act and not after admission as a nonimmigrant under Section 101(a)(15) in said act you have remained in the United States for a longer time than permitted. As I have told you, I simply stated the charge is you are deportable because you were admitted into the United States for a limited time as a student and you have remained without permission for longer than that time. Do you admit that you are deportable on this charge or do you deny that you are deportable on this charge?

A I admit it.

Q Now, do you wish to apply to leave voluntarily from the United States without expense to the government instead of being deported?

FORM I-299 (9-28-65)

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

Now we will consider the matter of how much time you would have to do this in due course but, if you have the money or other means by which you can depart without cost to the government and you are willing to depart when you're told you must depart, you may apply to leave voluntarily without being deported. Do you wish to apply for the privilege?

A I don't have money.

Q Alright then if you don't have the money and there are no funds available to you from any source or other means to depart without cost to the government, I must enter an order that you be deported. Do you understand? Now in connection with this statement I would tell you that you may ask the District Director for withholding of deportation on the ground that you are seven months pregnant and the Doctors have recommended that you might jeopardize your health to depart at this time but nonetheless on this record since you do not have the means to depart without cost to the government, I will have to enter an order that you be deported. Do you understand?

A I was seven months pregnant at the time, but the baby was born.

Q Oh, you have the baby now?

A Yes, of course.

Q I see the letter is undated as I have noted so I didn't know when the letter was written because there was no date on it. Alright, well, if you are without funds how will you not support her?

A My cousin helps. There is a problem in Waterbury and then they give me milk for the baby.

Q Do you receive something from the welfare authorities?

A No.

Q Do you have any other close relatives here other than the baby and your cousin?

A Another cousin, but a teenager. The hospital sent a letter over here and then they told me here that the letter got lost and then they sent me a copy of the original letter.

Q When was the baby born?

A September 15, 1974.

Q Alright now, as I say since you do not have the means by which you can depart without cost to the government, I must enter an order that you be deported. Is there anything else you wish to say or to have considered in your case before I make a decision?

IMMIGRATION JUDGE:

Let the record show there is an exhibit of a birth certificate of Wildo Antonio Ballenilla, born September 15, 1974 at Waterbury, Connecticut. This document was issued on October 1, 1974. It is returned to Respondent.

IMMIGRATION JUDGE TO RESPONDENT:

Q Alright, is there anything else now before I make a decision?

A Do you have to give the order I will be deported?

Q Well, yes as the only form of relief for which you could be possibly eligible would be that of voluntary departure without expense to the government. In your case you don't have any money or any other way to go without expense to the government. I have no alternative but to enter an order that you be deported. Do you understand?

A Then I have to be deported with the baby?

Q No. Whether you bring the baby with you or whether you leave it with your cousin or what arrangements you make will have to be your decision. The baby is a United States citizen. The baby is not included in any way in this Order. It's up to you what you wish to do with the baby. Now, to what country do you wish to go?

A If you deport me I prefer to go to the Dominican Republic.

Q Is there anything else at all now that you wish to say before I make that decision?

A I don't think you can deport me because the baby was born in this country.

Q Alright, I hand you a copy of my decision on Form I-38. This decision is that you be deported from the United States to the Dominican Republic on the charge contained in the Order to Show Cause. Do you understand?

A Then with the baby I will leave?

Q As I say the arrangements for the baby, that's up to you. The baby is in no way included in this Order. The baby is a United States citizen and the Order is that you be deported. Now, this decision is final unless you wish to take an appeal from it to the Board of Immigration Appeals in Washington. Do you wish to appeal from this decision, if not it is a final decision. What do you wish to do?

A I prefer to appeal to Washington.

Q Alright, I will give you the necessary forms. This I-290(a) in four copies, it must be submitted, if it is to be submitted, in three copies on or before November 29, eleven days from today since the

FORM I-299 TRANSCRIPT OF HEARING

tenth day is a holiday. Now, the fee for this appeal is $25.00 except that if you do not have the $25.00 to pay you may submit an affidavit stating that you do not have the funds to pay for the appeal in which case it will be heard without payment of the fee. This must be received, as I have told you, by November 29 or else the decision entered here today is final. Now, I will have you consult with someone here in the office because I do not know anything about this city, Waterbury, Connecticut, but you should go to the Legal Aid Society or the Public Defender or one of the social agencies and possibly get some help with the filing of this appeal form if you wish to file it. It is not a difficult form but nevertheless you may wish to have some help with it. As I said, if this is not back eleven days from today, November 29, the decision entered here today is final. Do you understand that?

A Yes.

IMMIGRATION JUDGE:

Alright, this hearing is closed.

HEARING CLOSED

I HEREBY CERTIFY THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF THE FOREGOING PAGES NUMBERED 1 TO 8 ARE A COMPLETE AND ACCURATE TRANSCRIPT OF THE ABOVE DESCRIBED PROCEEDING.

Signature

Title

Date

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A19 375 676

In the Matter of

Respondent.

Address (number, street, city, state, and ZIP code)

c/o Mojica, 172 Plaza Ave, Waterbury, Connecticut

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Dominican Republic and a citizen of Dominican Republic
3. You entered the United States at San Juan, Puerto Rico on or about January 8, 1974 (date); on or about
4. At that time you were admitted as a student and were authorized to remain in the United States in that status until May 30, 1974.
5. You have remained in the United States beyond May 30, 1974 without authority of the United States Immigration and Naturalization Service.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241 (a) (2) of the Immigration and Nationality Act in that after admission as a nonimmigrant under Section 101 (a) (15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at Room 361, Post Office Building 135 High St, Hartford, Connecticut on Monday, November 18, 1974 10:30 a.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: November 1, 1974

(signature and title of issuing officer)

(City and State)

Dist Director
Hartford, Conn.

Form I-221 (Rev. 7-1-73)Y

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross-examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service.

REQUEST FOR PRIOR HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

_____
(signature of respondent)

Before:

_____ _____
(signature and title of witnessing officer) (date)

CERTIFICATE OF SERVICE

This order and notice were served by me on _____ (date) in the following manner:

_____

_____
(signature and title of employee or officer)

RECORD OF SWORN STATEMENT

Office: Hartford, Connecticut File No.: A19 375 676

Statement by: DIGNA VALLENILLA-CARRION; aka DIGNA BALLENILLA-CARRION

In the case of: DIGNA VALLENILLA-CARRION; aka DIGNA BALLENILLA-CARRION

At: Hartford, Connecticut Date: October 8, 1974

Before: David D. Pecevich, Investigator
(Name and Title)

In the Spanish language. Interpreter was used.
(Mrs. Adrienne Miller, 48 N. Quaker La., Windsor, Conn.)

Investigator Pecevich to Respondent through Interpreter:

I am an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to take your sworn statement regarding: your remaining in the United States beyond May 30, 1974, without permission of the United States Immigration.

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court, or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Q. Do you wish to have a lawyer or any other person present to advise you?
A. No.

Q. Are you willing to answer my questions at this time?
A. Yes.
Please stand and raise your right hand. (Complies)
Q. Do you swear that all the statements you are about to make will be the truth, the whole truth and nothing but the truth, so help you God?
A. I do.

Q. What is your true and correct name?
A. DIGNA BALLENILLA-CARRION.

D. D. P.

Form I-263 (Rev. 4-1-68)

Q. & A. Statement of [illegible]
In re: [illegible]

Q. Where and when were you born and of what country are you a citizen?
A. May 5, 1950, at Santo Domingo, Dominican Republic, and I am a citizen of the Dominican Republic.

Q. Of what country are your parents citizens?
A. Same place.

Q. Where and when did you last enter the United States?
A. January 3, 1974, at San Juan.

previous visa 4/13

Q. At that time, you received permission to remain in the United States until May 30, 1974. Is that correct?
A. Yes.

Q. Did you apply for or receive permission from the United States Immigration to remain in the United States beyond May 30, 1974?
A. I did not ask, and I was pregnant, and then the doctor sent a letter saying that I should not travel and from here the doctor got an answer that it was all right.

whom?

Q. Did you ever seek work in the United States?
A. Because I was pregnant I didn't.

marriage cert. 7/24/75 (yes)

Q. Are you married?
A. No.

Q. Who is the father of your child?
A. JOSE ANTONIO BATISTA.

Q. Of what country is BATISTA a citizen?
A. Santo Domingo, Dominican Republic.

Q. Is he a permanent resident of the United States?
A. No, he does not live here. He lives in Santo Domingo.

Q. Did you apply for welfare in the United States?
A. Yes, but they told me to come here first. They called here and here they could not find the letter that the doctor sent.

Q. Are you willing to leave the United States at this time voluntarily?
A. Yes, if you order so.

-2-

Q. B.

Q. Have you ever received welfare in the United States?
A. No, because they told me that, first of all, I had to come here.

Q. With whom are you living?
A. With my cousin, RAMONITA MOJICA.

Q. What is your present address?
A. 172 Plaza Avenue, Waterbury, Connecticut, first floor.

Statement concluded 11:40 AM

I, being unable to read, speak, and understand the English language, but being able to read, speak, and understand the Spanish language, have had the foregoing statement, consisting of 3 pages, read to me in the Spanish language. I state that the answers made therein by me are true and correct to the best of my knowledge and belief, and that this statement is a full, true and correct record of my interrogation on the date indicated by below-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement and the corrections noted.

[signature]
(Signature)

I, being able to read, speak, and understand both the English language and the Spanish language, do hereby certify that I have read the foregoing statement, consisting of 3 pages, to DIGNA VALLENILLA-CARRION in the Spanish language and she stated that the same was true and correct in all respects.

(Signature)

Subscribed and sworn to before me at Hartford, Connecticut, on October 8, 1974.

[signature]
David D. Pecevich, Investigator
U. S. Immigration & Naturalization
Service, Hartford, Connecticut

I hereby certify that the foregoing statement, consisting of 3 pages, is a true and correct transcript of my stenographic notes taken at Hartford, Connecticut, on October 8, 1974. (Book No. 286, Page 42 to Page 44)

[signature]
Barbara M. Dalon, Clerk-Stenographer